



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms. Teresa Lanni  
**Respondent:** Hampshire Hospitals NHS Foundation Trust  
**Heard at:** Southampton Employment Tribunal  
**On:** 17<sup>th</sup> March 2023

**Before:** Employment Judge Lang

## Representation

**Claimant:** Ms. Lanni (In Person)  
**Respondent:** Mr. Allsop (Counsel)

# RESERVED JUDGMENT

1. The Claimant was not a disabled person for the purpose of the Equality Act 2010 for the period of 2014 up to August 2017 (it is accepted she is from August 2017 onward) And therefore those allegations which fall within that period do not fall for determination.

# REASONS

1. This is a claim brought by Ms. Teresa Lanni (the Claimant) by way of a two claim forms both dated 14<sup>th</sup> July 2021 and which have been consolidated. The claims are brought against her former employer Hampshire Hospitals NHS Foundation Trust (the Respondent), and are resisted by way of an ET3 and Grounds of Resistance dated 9<sup>th</sup> August 2021, and further Grounds of Response dated 7<sup>th</sup> April 2022.

## Background to this hearing

2. There have been a series of preliminary hearings within this case where the issues have been defined. The matter is listed for a 20 day final hearing commencing 30<sup>th</sup> October 2023. The issues to be determined at that final hearing were agreed and summarised in the order of Employment Judge Livsey dated 11th March 2022.
3. This hearing was listed by Employment Judge Slater on 8<sup>th</sup> November 2022 to determine the issues set out at paragraph 2(b) of the order:
  - i. A potential amendment application by the Claimant to include in her claim allegations she was disabled between 2014 and 2017;*
  - ii. Whether, in fact, the Claimant was disabled within that period.*
4. A further order of Employment Judge Cadney, dated 13<sup>th</sup> December 2022, at paragraph 4 further summarised the issues which needed to be considered at this hearing:
  - i. The Claimant's application to amend to include the allegations of discrimination between 2014 and 2017;*
  - ii. To determine whether the Claimant was a disabled person between 2014 and 2017 (disability having already been conceded in respect of a number of conditions from August 2017 (see CMO EJ Livesey 11<sup>th</sup> March 2022 para 41/4.1).*
  - iii. Case management orders for the final hearing will be given;*
  - iv. The question of future compliance give [sic] the IT difficulties encountered by the Claimant as set out in the Respondent's email of 8<sup>th</sup> December 2022 will be considered.*

5. Additionally, the Respondent made an application for the claim to be struck out or in the alternative an unless order to be made for non-compliance. An application was also made for a further deposit order (one having already been made by Employment Judge Gray). Those applications were not pursued at this hearing because (a) there was insufficient time and (b) the recent Employment Appeal Tribunal decision in **Mr A Minncoch and Others v Interservefm Ltd and Other [2013] EAT 35** in particular the guidance provided at paragraph 33. Both parties have however, been reminded about the need to comply with Tribunal Orders and the potential consequences of non-compliance and that is dealt with as part of the record of preliminary hearing which accompanies this Judgment, along with the case management directions. The directions were agreed in the alternative depending on my decision in respect of disability and amendment. If an application for a deposit order is pursued by the Respondent that application will be renewed. Given the above position I will make no further reference to those applications within this Judgment.

### **This Hearing**

6. The hearing took place on 17<sup>th</sup> March 2023 in person. It was listed for one day before me sitting alone. Due to the volume of documents, the number of issues which had to be determined, the need for regular breaks to ensure that the Claimant could fully and fairly participate, and the need to properly consider the issues, I was unable to give a Judgment at the hearing.
7. The Claimant represented herself and the Respondent was represented by Mr Allsop of Counsel. I have had the benefit of two bundles of documents. The first being a bundle of documents for this hearing running to 422 pages. The second being a bundle of correspondence running to 195 pages. Within the core bundle I have the benefit of the Claimant's first impact statement which is "*undated but sent in November 2021*", a letter from the Claimant dated 29<sup>th</sup> November 2022 and a second impact statement dealing with the question of disability for 2014-2017 which again is "*undated but was sent on 13<sup>th</sup> December 2022*". From the Respondent, I had the benefit of a statement of Dr Jane Spenceley dated 25<sup>th</sup> January 2023. Dr Spenceley is a Consultant in Occupational Health for the Respondent and who met with the Claimant on several occasions during her employment. I also had the benefit of a skeleton argument dated 16<sup>th</sup> March 2023.
8. At this stage I wish to make three preliminary points:
  - i. I appreciate that this hearing was difficult for the Claimant. I took regular breaks throughout the hearing to ensure she was able to participate fairly.

Whilst it was clear that it was difficult for her, I was grateful for the way in which she engaged in the hearing and put her case so I could understand what she wished to say.

- ii. I was grateful to the Respondent's Counsel and Solicitors for the way in which they have presented their case both at the hearing and in preparation for it. That has assisted me in the questions I must consider.
  - iii. There are a significant number of documents. The fact that I have not explicitly referred to a document within these written reasons does not mean I have not considered the evidence. I have considered all the documents I have been referred to and in producing these reasons I have reviewed the relevant documents and my note of the hearing.
9. It was agreed at the start of the hearing I would first consider the question of whether Ms Lanni was a disabled person for the period of 2014 – August 2017, before then considering the question of whether Ms Lanni should be given permission to amend her claim form to include those allegations. That is because those issues are interlinked. It was explained at the start of the hearing that when determining the question of disability I must address the Goodwin questions, which are set out below. They were put to the Claimant to ensure that she was aware of what issues this hearing would consider and so she could comment on each of them during her evidence and submissions.
10. In so far as the amendment application was concerned, I confirmed with the Respondent their understanding of what was being asked to be included within the Claim form and that was subsequently confirmed by the Claimant. Those allegations are set out in writing in the list of issues from Employment Judge Livesey's order of 22<sup>nd</sup> March 2022 and as set out below. The Claimant confirmed it was those allegations which she sought to include within her claim and there were no others.
11. The Respondent accepts that the Claimant was a disabled person for the purpose of the Equality Act 2010 from approximately August 2017 as recorded in the order of Employment Judge Livesey dated 11<sup>th</sup> March 2022.
12. The Respondent does not accept that the Claimant was a disabled person for the purpose of the period of 2014 up until August 2017. That is relevant as the following allegations, as were recorded in the order of EJ Livesey, fall within that period and the Claimant seeks for them to be included within her claim by way of amendment.

The numbering below refers to the numbering in the list of issues of EJ Livesey's order, and the comments in square brackets are mine. The relevant allegations are summarised as follows:

#### Direct discrimination (Equality Act 2010 section 13)

5.1.3. In September – November 2015 did the Respondent remove the Claimant from Clinical Governance (to the McGill Ward) in an attempt by Yvonne McWean to dismiss her.

5.1.4 In September – November 2015 did the Respondent (Ms Ludick, her manager) stop the Claimant's salary whilst she was working in Clinical Governance and when she had brought her grievance in an attempt to make her discontinue the grievance.

#### Reasonable adjustments (Equality Act 2010 ss.20 & 21)

In respect of the Provision Criteria and Practices identified:

7.2.1 The requirement for the Claimant to fulfil her full job role whilst on the McGill Ward [I note this allegation spans both prior and post 2017].

#### Harassment related to disability (Equality Act 2010 s.26)

8.1.2 Was the Claimant shouted at by HR Representatives in HR meetings. Was the Claimant called a liar and did they say the Claimant had not had a workplace accident. The Claimant relies upon incidents in 2016 (when she was allegedly shouted at by Susie Bleeker and 30<sup>th</sup> August 2018 (when she was allegedly shouted at by Louise Carstens). [Again, for the avoidance of doubt it is the allegations in 2016 which are relevant for this Judgment].

8.1.5. Was the Claimant incorrectly accused of failing to turn up for duty one night in 2015 by Alison McGuinness after she had reported a nurse on the same ward as unfit to practice at an HR meeting.

8.1.6 Did the Respondent fail to take any action against the senior manager in the Clinical Governance team, Ms Ludick, when the Claimant felt she should have had her job back in 2015;

8.1.7 Did the Respondent (Ms Bleeker) inform the Claimant she was 'lucky to have a job' and 'how dare she complain about senior manger' at the grievance outcome meeting in the spring of 2016.

13. For the avoidance of any doubt when the above allegations extend from August 2017 it is the period prior to that which is relevant for the purpose of this Judgment.

### **Issues**

14. The issues I need to consider as part of this Judgment are:

- i. To determine whether the Claimant was a disabled person between 2014 and up until August 2017 namely:
  - a. Was there an impairment?
  - b. What were its adverse effects?
  - c. Were they more than minor or trivial?
  - d. Was there a real possibility that they would continue for more than 12 months or that they would recur?
- ii. If the Claimant is a disabled person whether she should be given permission to amend her claim to bring the claims set out at paragraph 12 of this Judgment (so far as they occur before August 2017).

### **Findings of Fact**

15. I have confined my findings of fact to those I must make for the purpose of the issues. I do not need make findings in respect of the wider allegations, nor do I need to decide if the allegations are true or proven. They may fall for determination on another occasion depending on my conclusions.

16. I turn briefly to my impression of the witnesses. The Claimant found the hearing difficult, and she was upset and frustrated with the Respondent. That is not a criticism of her. There were times where her evidence conflicted with the documents and the Respondent's evidence. That I have no doubt is because the passage of time. The focus of this hearing has been on a position some events which are between 5 and 9 years old, it is natural that recollections will differ and change over time. I find she is someone who has done her best to assist me.

17. Dr Spenceley was an impressive witness, but again given the passage of time her evidence was there were elements she could not recall and she was frank about this.

18. The Claimant has produced two impact statements. The first was sent in November 2021, within that she did not attribute any impairment as being present in 2014 – August 2017. Nor did she include that in her Claim Forms.
19. As a result of the initial impact statement the Respondent wrote to the Tribunal by way of letter dated 20<sup>th</sup> January 2022. Within that letter the Respondent, whilst contesting the issue of knowledge and the allegations, accepted that for the period of approximately August 2017 onwards the Claimant was a disabled person for the purpose of the Equality Act 2010 and accepted earlier in that letter that the following conditions amounted to a disability within the meaning of the Equality Act 2010; *Chronic neck pain; chronic back pain; depression; anxiety*.
20. The matter then came before EJ Livesey on 11<sup>th</sup> March 2022 for a preliminary hearing. I am told and I find, and it was not challenged by the Claimant, that at that hearing, the Claimant for the first time raised the issue of disability discrimination and disability for the period of 2014 through to August 2017. That is corroborated by both Claim Forms which were lodged, and the impact statement lodged in November 2021. I therefore find that the first mention that the Claimant was disabled from 2014 – up until August 2017 was March 2022 and those are the allegations set out at paragraph 12 of these written reasons.
21. The Claimant has had three workplace accidents which have been referred to within this hearing. The first around 2012/2013, the second 2017 the third in 2019.
22. On 19<sup>th</sup> May 2014 the Claimant was signed off work by her GP. The Statement of Fitness for Work Form (“FIT note”) describes that the Claimant is not fit for work, for the period of 19<sup>th</sup> – 26<sup>th</sup> May 2014 the reason is recorded as “*stress related*”. It does not state more than that. The Claimant accepted that was the only FIT note which she had received for 2014 but told me that there had been an occupational health note from her manager called Stella stating she needed counselling. That she said was in 2014 or 2015. I find that the Claimant did have a period off work of 7 days which was stress related in 2014 and that was the only period of time off work for stress, or any other mental health condition in 2014. I have the benefit of the manager’s referral for counselling from 1<sup>st</sup> April 2015 and find that referral took place then, not in 2014 as the Claimant thought it may have been.
23. From 22<sup>nd</sup> April 2015 – 6<sup>th</sup> May 2015 the Claimant was not fit for work because of “*work stress*”, as demonstrated by the FIT note dated 22<sup>nd</sup> April 2015. The entry in the GP records states the following under the heading *problem*:

*Bullied at work, but oddly, now she is being scrutinised at work, and this she finds stressful, was just seeking an apology, as mediation meeting coming up on mon, and I reflected back to her hopefully things will resolve themselves.*

24. The Claimant accepted in evidence and I find that this period of sickness was due to due to a workplace situation, she told me it was because of her being bullied. It is not appropriate for me to determine whether she was bullied. But I accept that is what she told the GP and her evidence that is why she was suffering stress and signed off at that time.

25. On the 1<sup>st</sup> April 2015 the Claimant's manager referred her for "*counselling following reports from Teresa that she has suffered bullying in the workplace*" as supported by the Heath4work referral.

26. A further sick note was provided on the 6<sup>th</sup> May 2015, this again stated that the reason was because of "*stress at work*". The corresponding GP note this time under the heading *History* records "*Bullied at work. Had repeatedly reported unsafe staffing levels. Mediation meeting 18<sup>th</sup> May 2015. Occ Health advise Med3 until then. Has reduced hours but Senior Nurse from HR meeting tomorrow to arrange relocation.*"

27. The context of these absences is also set out within the Occupational Health Records by Health4Work in their report, dated 29<sup>th</sup> April 2015. That document records that: "*Teresa reported that she has been bullied in the workplace.*" The author goes on to document the situation in the workplace, noting a difficult working relationship and that "*the situation has had a detrimental effect on her psychological wellbeing and she is currently on Med Cert sickness absence*" it goes on to note "*I am of the opinion Teresa is likely to remain on Med certificated sickness absence until the situation at work is resolved*". The author goes on to recommend that a stress risk assessment is completed. The Claimant accepted in her evidence that the allegations of bullying were what led to this of this period of sickness as was documented. Her last day of absence was 17<sup>th</sup> May 2015.

28. The experiences of the Claimant during this period is further recorded by way of an email sent on 4<sup>th</sup> September 2015 that a bullying and harassment claim was made by the Claimant against her manager for the period of March –May 2015 which was closed when *an informal/ initial mediation stage had resolved the issues*. It was also said in that email that there would be a meeting as the secondment which had resolved the issue had not worked out and to discuss



options. The Claimant was keen to emphasise to me that she does not agree with the perception of the managers, however, for the purpose of this Judgment I do not need to determine who is correct. I simply find that there was an issue between the parties, and it is accepted that the Claimant was asked to leave that role I find she was not happy about being asked to do so.

29. The Health4Work referral form dated 28<sup>th</sup> October 2015 documents that there was a period of sickness absence on 28<sup>th</sup> September 2015 – 4<sup>th</sup> October 2015 for *stress*. That record however also notes “*(has not attended work since 7<sup>th</sup> Sept, has taken annual leave and unpaid leave to date)*”. I cannot make a finding if that earlier period was stress related or not, but it does not change my findings or conclusions. That record also corroborates there was a period off work for stress from 17<sup>th</sup> April 2015 – 17<sup>th</sup> May 2015. It was put to the Claimant in evidence, that the period of sickness at the end of September related to her grievance about being asked to leave this role, this was disputed by the Claimant. The reason for that in my Judgment was because she disagrees with the way in which it is characterised by the Respondent. Again, I need not make any findings on who is correct, but what I do find is that the Claimant had a period off work which was described as stress, and I find that was because of the difficulties she was having at work at that time and being asked to leave the role which she was performing and she did not agree with that decision.

30. On 5<sup>th</sup> November 2015 the Claimant met with occupational health. The referral was “*regarding health and wellbeing from HR/ Manager ?stress + anxiety. Currently undergoing grievance process. Denies anxiety given “iTalk”*”. The documents go on to state “*Teresa disputes suffering from stress/ anxiety and states that currently she does not require any support from Health4Work in relation to this*” however, details of counselling were provided. That letter is also supported by the contemporaneous notes which have been provided to me and I have reviewed. Whilst the Claimant initially could not recall this specific meeting, she later denied making the comments which are recorded in the note of that meeting. She told me she had many meetings and I accept that evidence. However, I find that because of having multiple meeting and the passage of time, some 7 years, that has impacted on her recollection. That is not a criticism. I find that the meeting took place and the letter and contemporaneous records are an accurate reflection of it.

31. I find that the Claimant did not have any time off work for stress or anxiety in 2016. That is supported by the records I have been provided with as well as the Claimant’s sickness record which breaks down the periods of time which the

Claimant has had off work and attributes a code to each absence. The relevant code for these reasons is *SB10 Anxiety/ stress/ depression/ other psychiatric illness*. The following periods are documented as having been off for such absence:

17<sup>th</sup> April 2015-17<sup>th</sup> May 2015 a total of 31 days,

28<sup>th</sup> September 2015 – 4<sup>th</sup> October 2015 a total of 7 days.

The next period of sickness for the same classification does not occur until 21<sup>st</sup> May 2018.

32. Having initially accepted that sickness record as being accurate the Claimant rightly pointed out that the period which she was off for in May 2014 is not categorised as SB10 on the record, but instead it is recorded Eye problems. I also observe the 2017 absence is not recorded under SB10. In my judgment I must have some caution in accepting this document as being fully accurate, however, there is no evidence from the Claimant or elsewhere that indicates that she was off due to an SB10 absence in 2016. Nor that she had any other periods of time off which we have not discussed in respect of stress. I therefore find that there was no period of absence for anxiety, stress, depression or other psychiatric illness in 2016.
33. The Claimant was signed off by way of a further FIT note for the period of 6<sup>th</sup> May 2017 to 15<sup>th</sup> May 2017, again that is recorded as being *stress related*. On 14<sup>th</sup> May 2017 the Claimant completed a Health Assessment form and stated she did not have a disability. She told me that is because she considered disabilities were physical and her belief was something such as stress and anxiety would not classify as a disability. Plainly this interpretation is incorrect, however, I find that was her belief at the time.
34. It is accepted that it was not until October 2017 that the Claimant was prescribed any medication. She did however, tell me during the hearing that she had taken a supplement called St John's Wart to assist her. She had been doing this since 2015. The first mention of that was during the hearing. She explained she had reservations on taking medication for depression and that she was not, as she put it a "pill taker." I find that the first time any medication was taken was in October 2017, whether or not the Claimant was taking St John's Wart does not alter my conclusions or findings. There is no evidence it had any impact on her.

35. Within her second impact statement, and during her evidence, the Claimant asserted that her GP had told her that her impairment started in 2014. She stated it *“commenced in 2014 according to my GP and continues to this day”* she goes on in that statement to set out *“My GP and several medical persons have confirmed that it lasted more than 12 months they include Dr Spenceley at HHFT my GP [sic]”*. When this was clarified the Claimant confirmed to me that she meant this was from 2018 in respect of her GP. She made the same comment in respect of Dr Spenceley with the Claimant commenting that she thought Dr Spenceley was referring to her depression and anxiety. Dr Spenceley denied having said that any mental health symptoms dated back to 2014. I accept that evidence. I also accept Dr Spenceley’s evidence and find that the periods off work for stress from 2014 through to August 2017 were a response to the situations at work at that time, not because the Claimant was suffering with depression or anxiety. I accept her evidence that it was therefore likely to resolve shortly afterwards. I find each period was for a different specific incident.
36. Dr Spenceley produced a report dated 7<sup>th</sup> November 2018 wherein the Claimant asked her to record that she was disabled. Dr Spenceley rightly pointed out that was a question for a Tribunal rather than a medical professional, however, what is clear, and I find, is that when the Claimant met with her the Claimant was asking for it to be recorded she was a disabled person from August 2017. Dr Spenceley gave an opinion that she would be from a medical perspective. Whilst the accuracy of this was challenged, I accept the evidence of Dr Spenceley which is supported by her contemporaneous documentation. In my Judgement that is the best evidence before me. The Claimant was unable to show to me, and I have not identified, a report from Dr Spenceley or the Claimant’s GP indicating that she was disabled prior to August 2017 as she alleged.
37. I am not satisfied that there is sufficient evidence that the GP attributes the current anxiety and depression as extending back to 2014, the contemporaneous evidence does not support that assertion. I accept and have found there were periods of stress but that is different and as set out above I accept that was in response to the specific incidents at that time.
38. Whilst the Claimant argues that this does not correspond with what iTalk have told her, the documentation I have from iTalk does not deal with diagnosis or prognosis and their involvement is post August 2017. Whilst there was information given as part of the 2015 referral it is accepted that there was no engagement with iTalk in 2014 – 2017. The Claimant told me that iTalk had said her *“anger started on*

*Freshfield as I did not think I did anything wrong, I was known as trouble maker in every department trouble maker.*" I find the Claimant was referring to the alleged behaviour as having caused her impairment and that was clear to me throughout her evidence she blames the Respondent's actions from 2014 as causing the impairment she later experienced. That is not the question I must determine.

39. Dr Jenkins wrote to the other professionals involved in the Claimant's treatment by way of a letter typed on 17<sup>th</sup> August 2018. That consultation followed a letter from Dr Jurynczyk, Consultant Neurologist dated 11<sup>th</sup> June 2018, who queried if the Claimant had PTSD, noting she was suffering with depression. The query related an incident five years previously when the Claimant was assaulted by a patient. Dr Jenkins writes *"it is my clinical impression that her anger, frustration and low mood is more associated with her struggles with acceptance and adjustment to living with persistent pain and also a result of the quite difficult stressful experience of trying to maintain her current work, not feeling supported and listened to"*. In dealing with the possibility of there being PTSD it was recorded that Claimant *does not have many of the symptoms*.
40. When challenged on this letter and it not recording that her symptoms persisted from 2014 the Claimant stated that she thought she had mentioned it, and that the notes do not reflect those of iTalk. When challenged she repeated she was on oath and that she remembers speaking to Dr Jenkins about it and that when one undertakes therapy it requires them to go into things. I accept the contemporaneous evidence as being accurate. I am not satisfied that there is evidence of possible PTSD existing from 2014 – August 2017. Whilst Dr Jenkins in his initial letter, queries about PTSD and the workplace accident from 2012/13 the Claimant was clear in her evidence to me that the symptoms from that accident had resolved. All the contemporaneous evidence supports the Claimant's anxiety and depression (and any possible PTSD) as occurring after the accident in August 2017.
41. Dr Jagdish a pain specialist wrote to Dr Harmer in April 2018 noting the feelings of anger and frustration which pertained to "this accident".
42. I am not satisfied that the Claimant has any diagnosis of PTSD, anxiety or depression in the period of 2014 up until August 2017, that was accepted by the Claimant in evidence and she could not point to a document which showed otherwise.

43. On 14<sup>th</sup> November 2018 the Claimant completed a job application and did not select she was disabled by way of a mental disability, but she did for physical disability. When asked to explain that she stated it would be a mistake on her part. Again, on an application from 15<sup>th</sup> January 2017 the Claimant did not tick that she had a disability for the purpose of the accident. Again, she said that she did not know it could be and it was a *mistake* on her part. Neither of those factors add to my findings, I accept that the Claimant is a lay individual, many individuals do not appreciate the legal definition of disability, the fact that she has not ticked a box or listed herself as does not mean she was not disabled. She also makes the valid point that often those who are experiencing a deterioration with their mental health may not be able to identify they need assistance.
44. Additionally, it was highlighted that the Claimant has some qualifications which appears to have included legal modules and has assisted, or certainly been trained to assist, members through her Union. This does not in any way alter my findings. The Claimant is a lay individual and I treat her as such both now and how she regarded matters during her employment.
45. In turning to the effect on normal day to day activities I find that the Claimant's normal day to day activities included going to work, looking after her daughter and normal household chores.
46. The Claimant described orally and in writing how she overate and put in 2 stone of weight. The Respondent's assertion was this was post August 2017 in accordance with the account she had given to Dr Jurynczyk as per his letter typed on 12<sup>th</sup> November 2018. The Claimant told me that she had put on weight before as well as after the accident. In contrast she also told me that her food was impacted to the extent that she had to set herself a goal to eat on days.
47. I find that the Claimant's weight did fluctuate as she described. However, I am not satisfied on the evidence that she put on weight because of stress, or any other impairment prior to August 2017. That accords with the account she gave to Dr Jurynczyk.
48. The further impact on the Claimant's normal day to day activities, were described as her becoming *restless, could not sleep, was slow in my body, having very lethargic movements*. She explained she did not look after her personal appearance including *failing to wash myself or get dressed for weeks when I was at home on sickness*, she goes on to describe *constantly cried and shouted and*

*slammed doors* before going in to say she *shut myself in doors and would not go out of the house cut myself off from everyone at work and all of my friends*. The Claimant further described *losing concentration*, being *snappy* and *argumentative*. She gives an example of forgetting to feed her daughter or pick her up from school, and attending her GP unkempt. When challenged on these effects actually occurring post August 2017, not prior to it, she denied this. I note when I look at her original impact statement there are similarities in respect of having low mood, being snappy and unsociable and a recording of what she records her daughter and partner said about how they perceived her.

49. I cannot see any contemporaneous evidence which supports the Claimant's position that she was unkempt during the relevant period and when attending her GP. and I have, again gone through the medical records I have been provided with. There is however reference in the referral from 5<sup>th</sup> November 2015 to occupational health as the Claimant being "*More anger [sic] and frustrated*". The Claimant told me it was on one occasion in 2015 she forgot to feed her daughter or collect her from school. This was clearly a significant incident and I accept her evidence that it occurred and it was in 2015 as she tells me.

50. Very sadly, she told me that her mental health has impacted on her daughter, who she said only remembers her mother as having depression and anxiety and does not recall having fun.

51. In submissions I gave the Claimant another opportunity to tell me about the impact on her normal day to day activities, these were irritability, lack of concentration, eating, anger, not sleeping, her daughter was forgotten to be fed one night.

52. I find that there is an overlap with the Claimant's recollection of how her impairment affected her post August 2017 and those which she alleges were present prior. On the balance of probabilities I find that the Claimant's normal day to day activities were effected in this way:

- i. She had periods of time off work.
- ii. On one occasion she forgot to collect her daughter and forgot to feed her.
- iii. She had periods of being angry and frustrated as documented in the November 2015 referral.

53. I am not satisfied and therefore do not find the wider effects alleged such as an impact on sleep, lack of personal care or keeping herself indoors and away from

colleagues is proven. In my Judgment the Claimant has conflated the two periods of pre August 2017 and post August 2017. This was also corroborated what she said at the end of her submissions, namely that the events have affected her over the last 5, or 6 years and before then she was happy. Even if I were wrong in that I find as per her impact statement the effects would be limited to the time where she was not working as she refers to periods when she was at home on sickness.

54. I do not accept the Claimant's evidence that she did not include the allegations from 2014 onwards in her claim form because she was just trying to get something down. Although I do accept that she would have been distressed as she told me. The Claim forms I have were detailed in going through the history and allegations post 2017. This was not a Claimant who wrote a one line claim, she set out in some detail in both her claims the background and the basis of her claim and then provided further detail when requested by the Tribunal. The original impact statement did not include the allegations either, I find it is unlikely she would simply have overlooked these points. I also have the findings of fact of Employment Judge Gray in relation to the steps which the Claimant could have taken to bring her protected disclosure claim in time which are relevant.

55. I do find that the Respondent, and indeed the Claimant would be suffer prejudice in seeking to obtain witnesses and evidence in respect of incidents which occurred so long ago.

## **The law**

### **Disability**

56. When referring to the burden of proof, the standard of proof which applies is the balance of probabilities, that is to say what is more likely than not. The burden of proof is on the Claimant to show that she was a disabled person for the purpose of the Equality Act 2010.

57. The starting point is the statutory definition of disability. This is set out at section 6 of the Equality Act 2020 as follows:

- (1) A person (P) has a disability if—
  - (a) P has a physical or mental impairment, and
  - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability—
  - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
  - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
- (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
  - (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
  - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
- (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
- (6) Schedule 1 (disability: supplementary provision) has effect.

58. Section 212 of the Equality Act 2010 states “substantial” means more than minor or trivial.

59. Schedule 1 of the Equalities Act 2010 applies. I have had regard to that schedule in particular paragraph sets out the definition of long term as following:

- 2** (1) The effect of an impairment is long-term if—
  - (a) it has lasted for at least 12 months,
  - (b) it is likely to last for at least 12 months, or
  - (c) it is likely to last for the rest of the life of the person affected.
- (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
- (3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.



(4) Regulations may prescribe circumstances in which, despite subparagraph (1), an effect is to be treated as being, or as not being, long-term.

60. For the period of time which I am considering paragraph 5 on the effect of medication does not apply within this case as no medication was taken until after the period I am considering

61. Paragraph 12 sets out that I must take account of such guidance as I see fit. To that end I have considered The “Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability. (“The Guidance”) I do not intend to set out each of the sections as that would be too voluminous, and I record that I have considered that guidance

62. In the case of **Goodwin v Patent Office [1999] I.C.R 302** Morison J (President) provided guidance on the proper approach for a Tribunal to take when considering the question of disability (under the Disability Discrimination Act 1995 as it was then). Relatively recently the Court of Appeal in **Sullivan v Bury Street Capital Limited [2021] EWCA Civ 1694** approved that test with Singh LJ setting out the questions which must be considered at paragraph 38 of the Judgment:

- (1) Was there an impairment?
- (2) What were its adverse effects?
- (3) Were they more than minor or trivial?
- (4) Was there a real possibility that they would continue for more than 12 months or that they would recur?

63. I have been taken to and considered the Judgment if **Underhill J in J v DLA Piper UK LLP 2010 WL 2131720**, in particular paragraph 40:

“In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues.”

64. However, I also remind myself of the decision by HHJ Tayler in **Mr A Elliot v Dorset County Council UKEAT/0197/20/LA** where at paragraph 18 he emphasised the need to not disaggregate the Goodwin principles, to consider them in the overall picture and furthermore gave further guidance on the approach to the question of whether an impairment has a substantial adverse effect on day to day activities.

65. When considering the substantial adverse effect, the authorities make clear that the emphasis should be on what the Claimant cannot do, rather on what she can do. To that end the Respondent has referred me to the case of **Aderemi v London and South Eastern Railway Ltd [2013] EQLR 198.**

66. The relevant time for considering whether the Claimant was disabled pursuant to s.6 of the Equality Act 2010 is the date of the alleged discriminatory act, or acts as in this case, as set out in **Cruickshank v Vaw Motorcast Ltd [2002] I.C.R 729.**

67. In relation to the question of long term, I must consider all three scenarios as set out within Schedule 1 paragraph 2, to not do so would likely be an error of law as per **McKenchin Plastic Components v Grant UKEAT/0284/08.** When considering if it was likely an impairment would last for 12 months I remind myself of the words of Girvan LJ in **SCA Packaging Ltd v Boyle [2009] IRC 1056** at 19:

*“The prediction of medical outcomes is something which is frequently difficult. There are many quiescent conditions which are subject to medical treatment or drug regimes and which can give rise to serious consequences if the treatment or the drugs are stopped. These serious consequences may not inevitably happen and in any given case it may be impossible to say whether it is more probable than not that this will occur. This being so, it seems highly likely that in the context of paragraph 6(1) in the disability legislation the word “likely” is used in the sense of “could well happen”.”*

*It has often been emphasised in the cases that the burden of proving disability rests with the applicant, who must bring medical evidence to establish this. Witnesses from any branch of medicine (including the professions related to medicine such as speech therapy) will be far more comfortable with assessing the reality of the risk rather than putting precise percentages upon it”.*

## Amendments

68. The application to amend is a case management decision and accordingly the overriding objective as set out at Rule 2 of the Employment Tribunals Constitution and Rules of Procedure Regulations 2013 Schedule 1 applies.
69. I have also been taken to and Guidance Note 1 to the Presidential Guidance – General Case Management.
70. The principles as set out within **Skelnet Bus Co Ltd v Moore [1996] ICR 836** apply. In particular it is stated by Mummery J (President) *Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.* The further considerations as set out within Skelnet apply.
71. I have been taken to the decision of HHJ Talyer in **Vaughan v Modality Partnership [2021] IRLR 97**, where the approach to applications to amend was again set out. These factors include the question of time limits and how an amendment allowing a claim out of time was not decisive but a factor to take account of.

### **Conclusions**

72. I turn to my conclusions, having regard to the findings I have made, the issues which need to be considered and the applicable law. For ease whilst I have addressed my conclusions under each of the headings of the **Goodwin** principles, I have been mindful to take a holistic approach to the question as to whether or not the Claimant was a disabled person for the period of 2014 up until August 2017.

#### **Was there an impairment?**

73. In considering the question of impairment I have been assisted by paragraph A3 (and also emphasised at A7) of the Guidance which sets out that the cause of an impairment does not need to be established. The term physical or mental impairment should be given its ordinary meaning. In addition it specifies *nor does the impairment have to be the result of an illness.* Paragraph A4 then goes on to note *Whether a person is disabled for the purposes of the Act is generally determined by reference to the **effect** that an impairment has on that person's ability to carry out normal day-to-day activities.*

74. The nature of the impairment the Claimant asserts has changed both from before the hearing as recorded in Judge Livesey's order, namely depression and during this hearing. For the period I am considering at times during the hearing the Claimant has asserted that it is depression, at others anxiety and at other points stress, sometimes also referring to PTSD. It is accepted that from August 2017 there was an impairment. That impairment was both physical and mental. I need not deal with the physical impairment. The mental impairment post August 2017 was depression and anxiety. That is what was alleged and accepted. I must consider whether the depression and anxiety was present from 2014 or 2017 which is the crux of the Claimant's argument but in my Judgment I must also consider whether the stress described was an impairment.

75. I consider I need to firstly ask myself did the impairments of anxiety and depression which it is accepted results in the Claimant being a disabled person from August 2017 persist from 2014 to August 2017 as the Claimant alleges. I conclude that it did not. I have found there is no diagnosis for this period and within my findings I have set out the medical correspondence around this period which links the period of anxiety and depression to occurring after the accident and relating to the effects of it. This includes there being no diagnosis for PTSD for this period either. However, I remind myself I do not need to have a diagnosis to conclude that there is an impairment.

76. In the Claimant's first impact statement she described the following mental impairments:

*Long term depression since 2017, diagnosed and confirmed in writing by Dr Spenceley lead Consultant in occupational health at HHFT [the Respondent] on medical discharge report dated 8<sup>th</sup> June 2020.*

*Long term Anxiety since 2017. Diagnosed by Dr Spenceley on medical discharge report dated 8<sup>th</sup> June 2020.*

*Depression diagnosed by Dr Jurynczyk on a medical report dated 12<sup>th</sup> November 2018.*

*iTalk services (community mental health services) self referred 15<sup>th</sup> September 2020.*

77. The Claimant also set out her physical disabilities and set out the length of those disabilities, the effect and nature of them, the treatment and the impact on her normal day to day activities. I do not need to set out what those effects were as

they relate to effects on or after August 2017. When I look at the Claimant's own words on the impairments that she alleges were present from 2014 up until August 2017 she states herself at the outset of the claim and within her impact statement provided in November 2021 that they occurred after 2017. In addition, I have found that the Claimant asked Dr Spenceley, as recorded in Dr Spenceley's report from 7<sup>th</sup> November 2018 that she sought to be classified as disabled from August 2017, for both her physical and mental impairments. I have also found that the first assertion the Claimant made about being disabled from 2014 and the allegations for that period was at the hearing in March 2022.

78. Furthermore, the Claimant in her initial impact statement states "*nature of disability mental health issues due to the way I had been treated by my employer over the last 5 years wished to address my anger issues and overcome my post-traumatic stress syndrome issues*". That in my Judgment underlines the main point behind the Claimant's argument, namely that it was those events which resulted in her present disabilities. That is not the same as being a disabled person from that date, and it is not for me to decide why she has her current mental impairments.

79. In the Claimant's second impact statement relating to the period of 2014 to August 2017. where she was answering a series of questions which had been posed by Employment Judge Slater. Under the heading *How long have I had the impairment* the Claimant states the following:

*The impairment began in 2014 exists to this day it will never leave me  
HHFTS psychologist Dr Caroline Harmer documented in her report in 2019  
I was describing signs and symptoms of post traumatic stress syndrome in 2019  
HHFTS neurologist in 2018 also wrote a medical report in which he stated I  
was suffering from post traumatic stress syndrome.*

80. I do not consider that the contemporaneous evidence supports that assertion and I have made a finding accordingly. All of the contemporaneous evidence in respect of the suspected PTSD (as it is at times documented), anxiety or depression all postdate the Claimant's accident in August 2017 and the evidence I have seen ties it to that accident and the aftermath of it. It is not for me to make findings on causation but given there is that link in my judgment it must be that acts as a trigger and therefore they cannot have existed beforehand, unless they were already present. There is no evidence they were. I was unable to make a finding that the GP or Dr Spenceley attributed her post August 2017 impairment from 2014.

81. I have not been able to make findings that iTalk state the current impairment was present from 2014. I also note my findings that medication and counselling all took place post August 2017, save the use of a supplement St John's Wart.
82. I have found in accordance with the evidence of Dr Spenceley that the periods of time which the Claimant had off work for stress in the period of 2014 – August 2017 were related to specific incidents and a response of what was going on at that time. I will return to this point further when considering the question of if the effects are long term.
83. However, whilst I do not consider that there is an impairment by way of the anxiety, depression (or for the avoidance of doubt any PTSD traits) in my judgement there is at times an impairment of stress. I am satisfied that in accordance with the guidance in particular my conclusions on the impact that it is an impairment on the specific facts of this case. However, I do not consider for the reasons I will come onto that it means that the Claimant was a disabled person for the purpose of the Equality Act for this relevant period.

#### **What were its adverse effects?**

84. The focus must be on what the Claimant cannot do rather than what she can do. I consider that there was an element of the Claimant transposing the effects that occurred after August 2017 to those beforehand. I reach that conclusion having had the benefit of her evidence and the contemporaneous documentation.
85. I have found for the reasons I have given within my findings of fact that there were the following adverse effects:
- a. She had periods of time off work.
  - b. On one occasion she forgot to collect her daughter and forgot to feed her.
  - c. That she had periods of being angry and frustrated as documented in the November 2015 referral.
86. Specifically in the period I am considering I have found she had the following periods off work:
- a. 19<sup>th</sup> – 26<sup>th</sup> May 2014;
  - b. 17<sup>th</sup> April – 17<sup>th</sup> May 2015;
  - c. 28<sup>th</sup> September - 4<sup>th</sup> October 2015;
  - d. 6<sup>th</sup> May 2017 – 15<sup>th</sup> May 2017;

87. I was not satisfied on the balance of probabilities the additional impacts complained of occurred in the relevant period, not because the Claimant was trying to be dishonest, but because of the passage of time, the lack of contemporaneous evidence and the conflicts within the evidence.

**Were they more than minor or trivial?**

88. I agree with the Respondent that there is a lack of evidence to show that there was a more than minor or trivial impact on the Claimant. There is no evidence on her periods of anger and frustration lasting for long periods, or preventing her doing anything. I am not satisfied that this would be more than minor or trivial.

89. However, where I disagree is that I do consider that the Claimant forgetting to collect her daughter and forgetting to feed her is more than minor or trivial. That is a significant effect. Further, whilst the Claimant has not asserted the effect within her impact statement, or her evidence, is the time off work in my Judgment is more than minor or trivial. That was a significant part of her day-to-day activities. Whilst I agree with the Respondent that this occurred around the time when other work events were occurring, such as the bullying allegations in March/ April 2015 and the grievance about the ward move in September 2015, the medical evidence from the GP records and note she was unfit for work for stress.

90. Whilst Dr Spenceley explains that the term stress is used for various reasons and does not necessarily amount to a medical reason, in my judgement the best account is that recorded on the medical records and FIT notes and I do not seek to go behind them. I also do not need there to be a medical diagnosis.

91. The impacts though which I consider to be more than minor or trivial lasted for a short period of time and I have found in accordance with Dr Spenceley's evidence and the wider findings I have made about events at that time, confined to comparatively short periods of time.

92. I should also note at this stage even if I were to have accepted the wider impacts asserted by the Claimant in her impact statement as related to this period of time, I do not consider there is any evidence that these impacts were more than minimal. There is no evidence that the Claimant was unable to do things because of them and they would on her own words be related to a period when she was off work,

which was a total of 54 days over a period which extended over 3 and a half years. I do not consider on the facts of this case that is more than minor or trivial.

**Was there a real possibility that they would continue for more than 12 months or that they would recur?**

93. The Guidance at paragraph C5 states *conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term'*. Paragraph C6 goes on to set out examples of when sporadic or short periods can be long term which goes on to include *“as well as mental health conditions such as schizophrenia, bipolar affective disorder, and certain types of depression, though this is not an exhaustive list. Some impairments with recurring or fluctuating effects may be less obvious in their impact on the individual concerned than is the case with other impairments where the effects are more constant.”*
94. For the period I am dealing with I do not agree that the impairment, no matter how it is characterised, has lasted for 12 months.
95. What is clear from the evidence is that the Claimant had periods off work as I have already set out. The GP recorded these as being as a result of stress, but they occur on different occasions and certainly the events in 2015 both occurred around specific events. Whilst it is correct that in 2015 the Claimant's manager suggested counselling, the context of that referral was bullying.
96. I am not satisfied that the stress started in 2014 and continued through to August 2017 as a continuous period. I do not consider there is any evidential basis for me to arrive at that conclusion that it was present as the Claimant invites me to conclude. The sickness record provided does not support long term absence as a result and there is no contention that in 2016 there was any period of time off or impact on the Claimant as a result of stress.
97. Whilst the Claimant may attribute her alleged treatment from 2014 onwards as being the cause of her current mental health impairment that question is quite separate to what I need to decide; I do not need to consider the cause but need to consider if she was a disabled person. There is no evidence that the impairment of stress was ongoing beyond the periods when the Claimant was signed off work save the one referral by the Claimant's manager in April 2015 for counselling this was just before she went off for a period of sickness for stress.



98. I do not consider that these sporadic periods, which related to specific events were of the sporadic nature that they may be classified as long term pursuant to the Guidance as summarised above.

**Was there a real possibility that they would continue for more than 12 months?**

99. No. I have found the periods of sickness in 2015 related to specific incidents. That was supported by the Occupation Health referral from 4<sup>th</sup> September 2015 which recorded that the March/April issue was concluded by way of mediation which resolved the issue. Additionally, the April 2015 Occupational Health document records that the Claimant's absence was likely to continue until the work situation resolved itself. The evidence of Dr Spenceley also corroborates that the periods of leave related to specific incidents and once they resolved so would the time which the Claimant had off. That remained her position despite robust challenge from the Claimant.

100. I do not consider there is any real possibility or that the stress documented on the specific periods of absence could well last for 12 months for the reasons I have just set out. There is no evidence that the issues at work would be prolonged or take longer than 12 months, in fact the evidence is they resolved quite quickly, regardless as to who is correct about what happened.

**Was it likely to recur or last for the Claimant's life?**

101. No. There is no evidence of this. Whilst the Claimant has had for periods of time off work over the period for stress in response to specific elements at work I do not consider that the evidence is such that the impacts would recur or last for the rest of the Claimant's life. The evidence of Dr Spenceley was she considered the impacts had, and would have, resolved after the specific incidents and the reaction was one off responses to those situations. That also corresponds with my findings in respect of the contents of the occupational health records and what they document. I accept that evidence. I do not consider that the four periods of time she had off demonstrate that stress response would recur such that it would have an impact on the Claimant's normal day to day activities or last for the rest of her life. In my Judgment the fact that there were no period off work in 2016 supports that.

102. I therefore do not consider that the impairment, namely stress had a long term adverse effect on the Claimant's normal day to day activities for the period of 2014 up until August 2017. From August 2017 it is agreed the Claimant was a disabled person.

### **Application to Amend**

103. Given my decision on disability I do not need to determine the application to amend. However, for completeness, even if I were wrong on the question of disability I would have refused the application to amend.
104. The nature of the amendment sought is to include the allegations which I have set out at paragraph 12 of these reasons within the Claim. Those allegations, span from 2014 through to August 2017. Some are 9 years old. Whilst the basis of claim would remain discrimination, the factual allegations are new compared to those raised within the original claim form.
105. The Respondent asserts that the claims would be out of time. The question of time is a factor which is relevant but it is not decisive. In my Judgement the issue of time would need to have been considered at any final hearing. I do not consider that to impact my decision on amendment.
106. If I do not allow the amendment the Claimant would be prevented from bringing 7 allegations, albeit some of those allegations would continue as they post-date August 2017. That would have a detrimental impact on the Claimant's claim.
107. If I allow the claim the Respondent would face prejudice by having to produce evidence to rebut allegations which are between five and nine years old. The Claimant herself accepted that these allegations are from a long time ago, although she tells me that she would not want to be here either and she had just wanted her concerns addressed.
108. When I consider all these factors, the fact I found that I did not accept the Claimant's position that it was an omission because she was just trying to get something down, the fact that the application to amend effectively only came after the hearing in March 2022 some 8 months after the claim form had been lodged, that the original impact statement did not deal with the allegations, and the significant prejudice to the Respondent. Whilst I appreciate there will be an impact

on the Claimant's claim, taking all those factors and the overriding objective into account I would have refused the Claimant's application to amend.

### **Concluding remarks**

109. The matter remains listed for a final hearing commencing 30<sup>th</sup> October 2023 to determine the remaining claims. The directions, which were agreed and made in the alternative accompany this reserved Judgment and written reasons. That includes the refined list of issues.

Employment Judge Lang  
Date 6<sup>th</sup> April 2023

Reserved judgment & reasons sent to the Parties on 12 April 2023

For The Employment Tribunals